***United States Court of Appeals***

***for the***

***District of Columbia Circuit***


# TRANSCRIPT OF RECORD

# BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 19,081, 19,252

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975

LYNN ROBERT CARLISLE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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(Appointed by this Court)

Washington, D.C.
July 30, 1965

# I N D E X

Argument

## STATEMENT OF THE QUESTIONS PRESENTED

1. Whether reversible error resulted when the District Court refused to grant appellant's Motion for Leave to File Notice of Appeal.

   a. Whether an indigent defendant in a Federal criminal case has a right to appeal from a conviction in the United tates District Court.

   b. Whether an indigent criminal defendant has the right to representation by counsel during the time allowed by Rule 37 (a) (2), Fed. R. Crim. P., for filing notice of appeal from a conviction in a United States District Court.

   c. Whether the ten-day period allowed by Rule 37 (a) (2) Fed. R. Crim. P., for filing notice of appeal commences to run before an indigent defendant is notified of his right to appeal and his right to the assistance of counsel.

2. Whether the ineffective assistance of counsel that appellant received following sentence is cognizable under Title 28 U.S. C. § 2255.

   a. Whether the appellant received ineffective assistance of counsel during the ten days following sentence in the District Court.

# TABLE OF AUTHORITIES

Miscellaneous

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 19.081, 19,252

LYNN ROBERT CARLISLE,

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# BRIEF FOR APPELLANT

## JURISDICTIONAL STATEMENT

Lynn Robert Carlisle, the appellant, was tried and convicted in the United States District Court for the District of Columbia of housebreaking and robbery, in violation of 22 D.C. Code 1801, 2901. Judgment of conviction was entered on November 15, 1963. No notice of appeal was filed after this judgment of conviction. On October 19, 1964, the United States District Court for the District of Columbia denied appellant's petition for Writ of Habeas Corpus, filed October 8, 1964. (Habeas Corpus No. 405-64). On December 14, 1965, a panel of this Court, in chambers, granted appellant's petition for leave to prosecute an appeal without prepayment of costs from the order denying the petition for a Writ of Habeas Corpus (No. 19,081).

On January 25, 1965, the appellant filed a Motion for Leave to File Notice of Appeal in the United States District Court for the District of Columbia. On March 15, 1965, the United States District Court denied the aforementioned Motion. On the same date, appeal was noted from the denial of the Motion (No. 19,252).

This Court has jurisdiction upon appeal to review both judgments of the District Court under 28 U.S. Code 1291.

## STATEMENT OF THE CASE

On August 26, 1963, an indictment was filed in the United States District Court for the District of Columbia charging the appellant with housebreaking and robbery (22 D.C. Code 1801, 2901). (R. - Crim. No. 780-63). On August 30, 1963, the appellant entered a plea of not guilty at the arraignment held before the Honorable William B. Jones of the District Court. (R.-Crim. No. 780-63). On September 10, 1963, the District Court appointed Donald Cefaratti, Jr., Esq., a member of the Bar of the United States District Court of the District of Columbia, to represent the appellant. (R. - Crim. No. 780-63).

On October 7, 1963, appellant was tried by a jury before the Honorable Charles F. McLaughlin of the District Court and was found guilty on both counts of the indictment (R.- Crim. No. 780-63). On November 15, 1963, the appellant reappeared before Judge McLaughlin and was sentenced to serve twenty (20) months to five (5) years on both counts, the sentences to run concurrently. (R. - Crim. No. 780-63). The defendant was represented at both the trial and sentencing proceedings by his Court-appointed counsel, Donald Cefaratti, Jr., Esq.

The appellant was not notified by either the Court at sentencing, or by his Court-appointed counsel at any time, of his right to appeal the judgment in Criminal No. 780-63. Judge

McLaughlin did not inform the appellant of his right to appeal the conviction under Rule 37, Fed. R. Crim. P. (Tr. - Sentencing Proceedings, Crim. No. 780-63). Appellant's Court-appointed counsel at trial affirms that the possibility of appeal was not mentioned to the appellant, nor was the appellant's right of appeal explained to him (R. - Crim. No. 780-63 - Affidavit of Donald Cefaratti, Jr., Esq.;[1/] Memorandum Decision of Judge McLaughlin in Crim. No. 780-63 at page 1).[2/] No appeal was taken from the convictions in Criminal No. 780-63.

On February 5, 1964, appellant's pro se "Motion for Suspension or Reduction of Sentence," addressed to Judge McLaughlin, was filed in the United States District Court. (R. - Civil No. 309-64). The pro se Motion alleged four (4) errors in the trial proceedings, to wit, (1) a violation of Rule 5, Fed. R. Crim. P. and the decision in Mallory v. United States, 354 U.S. 449 (1957); (2) that the appellant was arrested without probable cause; (3) that the conflicting testimony of the Government witnesses at trial could not support the verdicts of guilty; (4) that the appellant received ineffective assistance of counsel. (R. - Civil No. 309-64).

On February 6, 1964, Judge McLaughlin filed an Order construing appellant's pro se Motion as a "Motion to Reduce Sentence"

1/ Hereinafter cited as "Affidavit."

2/ Hereinafter cited as "Memorandum Decision."

under 28 U.S.C. 2255. In denying appellant's Motion, Judge McLaughlin's Order stated, in part:

> The Court having fully considered the defendant's motion and the files and records in this case, and the Court being fully advised in the premises, and it appearing conclusively that the defendant is entitled to no relief [said motion is denied.] (R.-Civil No. 309-64).

Appellant's petition to appeal this Order without pre-payment of costs was filed on May 1, 1964, and Judge McLaughlin granted this petition. On July 1, 1964, a panel of this Court, in chambers, sua sponte dismissed appellant's appeal as frivilous, and denied his motion for the appointment of counsel (No. 18,645).

On October 8, 1964, appellant's petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of Columbia (Habeas Corpus No. 405-64). This petition alleged five (5) grounds as the basis for the issuance of the writ, to wit, (1) that the appellant had been arrested without probable cause; (2) that the appellant's rights under Rule 5, Fed. R. Crim. P., and the decision in Mallory v. United States, supra, had been violated; (3) that the Government witnesses had committed perjury and that their conflicting testimony could not support the verdicts of guilty; (4) that the Trial Court forced the appellant to incriminate himself in violation of the right guaranteed him by Amendment V

of the United States Constitution; and (5) that the Trial Court erred in the instructions to the jury and refused to consider newly-discovered evidence in the prior Motion pursuant to 28 U.S.C. 2255. The Honorable Edward A. Tamm of the United States District Court denied appellant's petition for the issuance of the writ. On October 19, 1964, Judge Tamm also denied appellant's petition for leave to appeal without prepayment of costs from the aforesaid Order denying the issuance of the writ (Habeas Corpus No. 405-64). On December 14, 1964, a panel of this Court, in chambers, granted appellant's petition for leave to appeal from the Order below in Habeas Corpus No. 405-64, and his request for the appointment of counsel (No. 19,081).

On January 25, 1965, the appellant, represented by counsel appointed by this Court, filed, in the District Court, a "Motion for Leave to File Notice of Appeal" from the Judgment in Criminal No. 780-63. On February 26, 1965, Judge McLaughlin heard oral argument on appellant's Motion, taking the issue under advisement. On March 15, 1965, Judge McLaughlin filed a Memorandum Opinion denying appellant's Motion for Leave to File Notice of Appeal. Appellant's appeal from this Order was noted the same day (R.-Crim. No. 780-63).

On April 5, 1965, on appellant's motion, this Court consolidated the two appeals (Nos. 19,081, 19,252) and granted the request for the appointment of counsel.

## STATUTES INVOLVED

U.S. Constitution, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy, and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

28 U.S. Code 2255: FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto....
>
> ....
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Rule 37, Fed. R. Crim. P.: TAKING APPEAL; AND PETITION FOR WRIT OF CERTIORARI.

(a) Taking Appeal to a Court of Appeals.

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after the entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment or conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant....

Rule 44, Fed R. Crim. P.: ASSIGNMENT OF COUNSEL.

If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.

## STATEMENT OF POINTS

I. Reversible error resulted when the District Court refused to grant appellant's Motion for Leave to File Notice of Appeal.

A. An indigent defendant in a Federal criminal case has a right to appeal from a conviction in the United States District Court.

B. An indigent criminal defendant has the right to representation by counsel during the time allowed by Rule 37 (a) (2), Fed. R. Crim. P., for filing notice of appeal from a conviction in a United States District Court.

C. The ten-day period allowed by Rule 37 (a) (2), Fed. R. Crim. P., for filing notice of appeal does not commence to run until an indigent defendant is notified of his right to appeal and his right to the assistance of counsel.

With respect to Point I, appellant desires the Court to read the following parts of the Record: Affidavit of Donald Cefaratti, Jr., Esq.; Memorandum Decision of the Honorable Charles F. McLaughlin.

II. The ineffective assistance of counsel that appellant received following sentence is cognizable under Title

28 U.S.C. §2255.

A. The appellant received ineffective assistance of counsel during the ten days following sentence in the District Court.

With respect to Point II, appellant desires the Court to read the following parts of the Record: Affidavit of Donald Cefaratti, Jr., Esq.; Memorandum Decision of the Honorable Charles F. McLaughlin.

## SUMMARY OF ARGUMENT

A defendant convicted of a crime in a United States District Court has what amounts to a right to appeal that judgment. Such defendant has the right to the assistance of counsel on appeal. Right to counsel at the appellate stage includes that time following sentencing during which the right to appeal *in forma pauperis* must be obtained. Where court-appointed trial counsel fails to notify a defendant of his right to appeal, there has been a *de facto* withdrawal by counsel, leaving the defendant without legal representation. The time allowed for filing a notice of appeal does not begin to run until an indigent defendant is notified of his right to appeal, and his right to the assistance of counsel to prosecute the appeal.

As an alternative to the first argument, where it is determined that court-appointed trial counsel did not inform his client of his right to appeal, this fact amounts to ineffective assistance of counsel. Such ineffective assistance of counsel is cognizable under 28 *U.S.C.* §2255.

I.

REVERSIBLE ERROR RESULTED WHEN THE DISTRICT COURT REFUSED TO GRANT APPELLANT'S MOTION FOR LEAVE TO FILE NOTICE OF APPEAL.

As Judge McLaughlin stated in his Memorandum decision on appellant's Motion below,

> The issue before the Court is: Is a defendant, some 14 months following sentence, permitted to file notice of appeal where at the time of sentencing neither the Court nor his court-appointed counsel informed him of the right to appeal?

In answering this question in the affirmative, the appellant respectfully urges the acceptance of the following argument.

A. An Indigent Defendant In A Federal Criminal Case Has A Right To Appeal From A Conviction In The United States District Court.

Although, as the Supreme Court noted in Carroll v. United States, 354 U.S. 394, 400 (1957), a defendant's right of appeal in criminal cases in the federal courts is of relatively recent origin, that right now exists as a matter of course. As stated in Coppedge v. United States, 369 U.S. 438, 441 (1962):

> Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right. That is, a defendant has a right to have his conviction reviewed by a Court of

> Appeals, and need not petition that court for an exercise of its discretion to allow him to bring the case before the court.

In attempting to assure to the greatest degree possible, within the statutory framework for appeals created by Congress, equal treatment for every litigant before the Bar, the Coppedge decision equated the indigent defendant's right with a non-indigent's. The indigent, said the Court, "is to be heard, as is any criminal appellant, if he makes a rational argument on the law or facts." Id. at 440.

The Court in Coppedge went on to lay down two general rules for the courts to follow when examining a convicted indigent defendant's contentions on appeal. First, the Court reasoned, if the issues presented are clearly not frivolous, the Court of Appeals must grant leave to appeal in forma pauperis and appoint counsel to represent the defendant. Second, if the court cannot decide whether the defendant's allegations are of substance, then the court must provide the would-be appellant with the assistance of counsel and a sufficiently complete record to examine the prior proceedings. See also, Ellis v. United States, 356 U.S. 674 (1958).

At the outset of this argument, therefore, the appellant asserts a right of appeal, a right that he possessed at least at the time of sentencing on November 15, 1963.

B. An Indigent Criminal Defendant Has The Right To Representation By Counsel During The Time Allowed By Rule 37 (a) (2), Fed. R. Crim. P., For Filing A Notice Of Appeal From A Conviction In A United States District Court

When the State moves to divest a citizen of life, liberty, or property, it acts with the ultimate power that the full weight of society carries. To restrain the power with which the State acts in criminal cases from proceeding imprudently, the law demands the employment of eminently fair and sober criminal procedures. One procedure that has been employed in the Federal criminal system since the decision in Johnson v. Zerbst, 304 U.S. 458 (1938), is an indigent accused's right to the effective assistance of counsel as guaranteed by Amendment VI of the United States Constitution.

The indigent's right to the assistance of counsel means more than the mere nominal designation by the Court of a lawyer to represent the accused. United States v. Ragen, 52 F. Supp. 265 (D.C. Ill. 1943). As the Court stated in Rogers v. United States, 325 F.2d 485 (C.A. 10th 1963):

> The right to counsel by an indigent accused of a crime embraces the right to representation at all times and during all proceedings where the fundamentals of due process are involved. He has a right to be cautioned, advised, and served by counsel so that he will not become a victim of his poverty (Emphasis added). Id. at 488.

This right to counsel extends through the exercise by the defendant of his right to appeal. Johnson v. United States, 352 U.S. 565 (1957). As a part of that right, the appellant urges this Court to recognize that an indigent accused has the right to representation during the ten (10) day period allowed by Rule 37 (a) (2) for filing a notice of appeal following a conviction in the United States District Court. The Court, in Anderson v. Heinze, 258 F.2d 479, 481 (C.A. 9th 1958). cert. den. 358 U.S. 889 (1959); admonished:

> Since the Sixth Amendment entitles defendants in federal criminal proceedings to the aid of counsel (Johnson v. Zerbst, 304 U.S. 358...), that right extends to every phase of the appeal, including the preliminary phase of obtaining permission to appeal in forma pauperis (emphasis added).

See also, Weber v. United States, 254 F.2d 713 (C.A. 8th 1958).

Although the Supreme Court in Coppedge, supra at 441, noted that "the indigent defendant will generally experience no material difficulty in filing a notice of appeal," the logic of the proposition in Anderson, supra, is undeniable. Since the indigent has the right to appeal an adverse decision at trial, he has the corollary "right to be cautioned, advised, and served by counsel" in order that his decision regarding the question of appeal will be intelligent and informed. For his decision to be a considered choice, a defendant must have the advice of counsel on such important matters as the possibility of appealable

errors at trial, the likelihood of sustaining those errors on appeal, and if successful on appeal, the ultimate outcome at a new trial. Fay v. Noia, 372 U.S. 391 (1963); Dodd v. United States, 321 F.2d 240 (C.A. 9th 1963). As this Court decided in Wildeblood v. United States, 106 U.S. App. D.C. 338, 340 (1959), regarding an indigent's appeal to the then District of Columbia Municipal Court of Appeals:

> Unless the defendant is given the aid of counsel in preparing an application [of appeal], the right to file one may well be useless.

In the instant case, appellant contends that he clearly did not have the guiding hand of counsel during this important phase of the proceedings. Mr. Donald Cefaratti, Jr., appellant's court-appointed counsel at trial, has affirmed that neither the possibility of appeal nor appellant's right to appeal was discussed with the appellant either prior or subsequent to the sentencing procedure (see Affidavit).

Apparently, the District Court agreed with appellant's contention that trial counsel did not notify him of the right to appeal when it concluded:

> ... nor did his [appellant's] counsel inform Defendant of his appellate rights and the procedures to be followed to perfect such rights (Memorandum Decision at 1).

However, the District Court rejected appellant's argument that this failure of counsel to inform him of his appellate rights

amounted to a de facto withdrawal from the case, leaving appellant without any representation during the ten days following sentence (Memorandum Decision at 3,4,5,6 & 7). The District Court's conclusion was framed as follows:

> In the instant case, as set forth, supra, this Court finds itself unable to conclude that where defendant was represented at sentencing, it follows that defendant was unrepresented during the following ten days, where there appears no evidence in the record that defendant's counsel has withdrawn from the case and where the only evidence is that said counsel filed no notice of appeal . Memorandum Decision at 7).

This ruling of the District Court is based upon the premise that the only way counsel can, in fact, withdraw from a case is by filing a motion with the Court. However, this Court, in Jones Short & Jones v. United States, ___U.S. App. D.C. _____, ____, F.2d ___ (July 13, 1964) (en banc), recognized that unauthorized withdrawals, regrettably do occasionally occur (cited by the District Court, Memorandum Decision at 4). The question confronting this Court, appellant contends, is who should bear the burden of an unauthorized withdrawal? Surely not an indigent defendant represented by counsel, not necessarily of his own choice, who causes him irreparable injury by such a withdrawal. When the District Court Court found in the instant case that "effective representation may have ceased after sentencing ...", but that "legal representation continued," it decided that, during the ten days following sentence, counsel somehow "represented" the appellant. Appellant, in contrast, urges this Court to reach the

conclusion that the record demonstrates that the appellant had been abandoned by counsel; that there had been a withdrawal by counsel, albeit unauthroized; and that appellant was without the services of a professional advisor during the critical time allowed to obtain permission to appeal in forma pauperis.

In addition to the failure of counsel to advise appellant of his right to appeal, the Trial Court at no time informed appellant regarding the provisions of Rule 37, Fed. R. Crim. P. Although, under the existing rules, the Court was not required to so inform appellant, it is contended that the Trial Court had the obligation under Rule 44, Fed. R. Crim P., to make certain that appellant was represented by counsel during "every stage of the proceedings," including the ten days in which notice of appeal should have been filed. The District Court rejected this type of analysis, when it stated:

> Furthermore, it appears to the satisfaction of the Court that the judicial obligation of Rule 37 (a) (2) only arises when at the time of sentencing the defendant is unrepresented by counsel. The Court feels that it is not obliged by that rule to check periodically during the ten days following sentence as to the status of defendant's representation and when it finds that the defendant is no longer represented by counsel to then advise defendant of his right to appeal (Memorandum Decision at 7).

Appellant argues, however, that the Trial Court's affirmative duty rests upon Rule 44, not Rule 37, and that representation must be assured during the ten day period unless there has

been an intelligent and effective waiver. As one commentator has written:

> The rationale underlying the distinction between appearance at sentencing with and without counsel stated in the rule [37 (a)(2)] is the assumption that the defendant's interest in taking an appeal is protected when he appears with counsel. Thus, where the attorney assumes that his duties have ceased at the end of the trial, the court has not discharged its duty unless it acts affirmatively to advise the defendant of his right to appeal or to insure representation during the ten-day period [Note, "Timely Appeals and Federal Criminal Procedure," 49 Va. L. Rev. 971, 987 (1963)].

The combined result of the omissions by the Court and counsel was that appellant was not, in fact, represented by counsel during the ten days following sentence, and was never formally notified of his right to appeal or the steps to follow to protect that right.

C. The Ten Day Period Allowed By Rule 37(a) (2), Fed. R. Crim. P., For Filing A Notice Of Appeal Does Not Commence To Run Until An Indigent Defendant Is Notified Of His Right To Appeal And His Right To The Assistance Of Counsel.

Assuming that the Court accepts appellant's previous arguments that a convicted defendant in a Federal criminal case has the right to appeal and the right to counsel in preparing that appeal, it is incumbent upon appellant to analyze the filing requirements of Rule 37(a) (2) in light of the facts in the instant case.

At the outset, appellant admits that the ten-day period for filing notice of appeal is clearly jurisdictional and cannot be enlarged or extended by the courts. United States v. Robinson, 361 U.S. 220 (1960). Just as clear is a further proposition of Robinson, supra, that even though the Court may find that failure to file the notice of appeal was due to "excusable neglect," such fact does not permit prosecution of an appeal filed after the expiration of the ten-day period. Hodges v. United States, 108 U.S. App. D.C. 375 (1960), cert. dismissed as improvidentially granted, 368 U.S. 199 (1961).

At this time the appellant sees no need to rely on the theory of "excusable neglect" or potential enlargement of the filing time under Rule 45(b). However, the fact that Robinson has foreclosed those arguments at this time does not mean that

other interpretations are not available to appellant since Robinson is clearly distinguishable from the instant case.

Robinson is materially different from the instant case because there the attorney virtually admitted his own neglect to protect the rights of the defendant. Thus Robinson is a case of attorney failure, and it is indistinguishable from those type of cases where an attorney fails to object to the introduction of certain evidence or fails to respond timely to a particular motion. In Robinson, therefore, the defendant had an attorney who perhaps did not represent him adequately.

The appellant in the instant case contends that the record clearly shows that neither the Court nor his appointed counsel took any steps to insure that he would be represented by any counsel during the ten-day period (supra, Argument(I) (B)). The appellant here does not argue that during the time allowed for filing he was poorly represented by counsel, for such a situation would foreclose his right to appeal. Rather, appellant urges this Court to recognize that during the ten-day period he was completely unrepresented by counsel. Under these facts, appellant contends that his right to appeal was as effectively frustrated as if the Court or the Clerk had told him that he did not have the right to appeal, or had purposefully failed to file his notice of appeal.

Two other points, although not as important as the complete

lack of representation in the instant case, distinguish Robinson.

First, counsel in Robinson was retained, while here the counsel was appointed by the District Court. The fact that counsel was retained in Robinson was a point of emphasis by the Government in its brief. See, Government's Brief in United States v. Robinson, supra, at 3 and 30 (f.n. 21). Moreover, the status of counsel in relation to his client has been a distinguishing feature of other cases in this area. See, Hodges v. United States, 108 U.S. App. D.C. 375, 378 (f.n.4) (1960) (retained counsel);Boruff v.United States, 310 F.2d 918 (5th Cir. 1962) (appointed counsel). Although the District Court felt that this argument had been abandoned below (see, Memorandum Decision at 5), appellant interprets his position as limiting its consideration to a secondary role and as cumulative to the lack of counsel argument. However, appellant urges the Court to consider this factor in evaluating the significance of Robinson as precedent and deciding the continuing duty of the District Court under Rule 44.

As a final distinguishing feature, in Robinson there was no claim made that the defendant was not notified of his right to appeal. On the contrary, there is the clear indication that the defendant had fully discussed the question of appeal with his attorney. A defendant that has received professional counseling on the question is surely in a less prejudiced position than the appellant here.

The appellant contends that there is precedent for his interpretation of the running of the ten-day period in Rule 37(a)(2). In Boruff v. United States, 310 F.2d 918 (C.A. 5th 1962), the Court was faced with facts indistinguishable from the instant case. There the defendant was represented at trial in the District Court and at sentencing by court-appointed counsel. Neither the Court nor counsel notified the defendant of his right to appeal or the method to perfect it. Some four months after sentencing the defendant filed pro se papers which were treated as a notice of appeal. The District Court found that the court-appointed counsel had failed to inform the defendant of his rights. The District Court went on to allow prosecution of the appeal without expressing an opinion as to the timeliness of the notice.

Chief Judge Tuttle, writing for the majority of the Court of Appeals, found that the notice was timely and expressed it in the following manner:

> The ten day period during which a convicted person has a right to file notice of appeal may be long enough under ordinary circumstances, but no one can gainsay the fact that it is a very short time, and would be an utterly unrealistically short time, for a person who was not guided during every moment of the ten days by the advice of counsel. We think that the obligation of the trial court under Rule 44 is to see that counsel appointed to assist an accused during the trial includes the obligation to advise him with respect to his rights during the ten day period within which the final

> proceedings in the district court may be taken by him to assure him of his right to appeal. We think also that it is not an unwarranted construction of the language of Rule 37 (a) (2) to construe the words "defendant not represented by counsel" to mean a "defendant not represented by counsel during the ten day period" after which his failure to file a notice of appeal would forever bar such right. We conclude, therefore, that the ten day period within which Boruff was required to file his notice of appeal did not commence to run until he was actually notified of his right to appeal and his right to have counsel to assist him, under the peculiar facts of this case." 310 F.2d at 921, 922.

A decision such as Boruff, supra, which allowed an appeal after the expiration of the filing time, is not without approval by the Supreme Court. In Fallen v. United States, 378 U.S. 139 (1964), the Court allowed an appeal after the ten-day period when the notice of appealwas presumedly delayed by the mails. In that case, the appellant contends, there was less prejudice to the petitioner than in the instant case. There, in open court at the time of sentencing, the petitioner had asked about his right to appeal and the Court advised him that such a right existed. Furthermore, the petitioner was advised by his court-appointed attorney "to secure another attorney promptly so as not to forfeit his right to appeal." However, in the instant case, no such steps were taken to protect the appellant's rights.

The District Court felt that Fallen, supra, and Boruff, supra, both cases originating in the Fifth Circuit, presented

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1/ The District Court found Boruff to be inapplicable to the instant case because it decided that the appellant had legal representation during the ten days following sentencing Memorandum Decision at 6.

conflicting views (Memorandum Decisionaat 6-7). The Court further viewed that the Supreme Court failed to resolve this conflict when it stated in a footnote in Fallen that "although counsel was physically present at sentencing, it is an open question whether petitionerwas 'represented' by counsel within the meaning and purpose of the Rule [37 (a) (2) ]." (378 U.S. 139, 142, f.n.4). In contrast to the District Court's view, the appellant interprets this language as sympathetic toward his position on the continuing duty of the trial court under Rule 44, Fed. R. Crim. P., and the decision in Boruff, supra. Appellant's interpretation is strengthened by the language in the body of the opinion to which footnote 4, supra, refers. There the Court stated:

> In the first place, in spite of the promise of the Rule 4/ [37 (a) (2)], the petitioner was forced to take his appeal without the assistance of counsel. He was whisked away from the place of trial ... on the day after he was sentenced, and [not] ... afforded the opportunity to secure another attorney. 378 U.S. 139, 142-43 (footnote the Court's, emphasis added).

If, as the Supreme Court has noted, Rule 37 (a) (2) promises a defendant the assistance of counsel in prosecuting an appeal, it follows that Rule 44 places a burden on the trial court to insure that an indigent is, in fact, represented during the ten-day filing period.

The appellant urges this Court to find, as did the Court of Appeals in Boruff, supra, that the "defendant not represented by

counsel " language of Rule 37 (a) (2) means a "defendant not represented by counsel during the time for filing notice of appeal", and, therefore, that the ten-day period does not begin to run until the defendant is formally notified of his right to appeal. Such an interpretation would be in conformity with the admonition of Rule 2 that "[t]hese rules are intended to provide for the just determination of every criminal proceeding."

Unless this Court reverses the decision of the District Court, appellant will have been denied his right to appeal without ever having been advised and professionally assisted regarding that right. As the Supreme Court noted in Ellis v. United States, 356 U.S. 674, 675 (1958), "[n]ormally, allowance of an appeal should not be denied until an indigent has had adequate representation by counsel."

II

THE INEFFECTIVE ASSISTANCE OF COUNSEL THAT APPELLANT RECEIVED FOLLOWING SENTENCE IS COGNIZABLE UNDER TITLE 28 U.S.C. § 2255.

If this Court determines that the relief sought by the appellant in Argument I, supra, is inappropriate, appellant urges the Court, in the alternative, to conclude that he re-deived ineffective assistance of counsel during the ten days following sentencing and that said sentence was thus "imposed in violation of the Constitution ... of the United States."

In appellant's first Motion under 28 U.S.C. §2255, (Civil No. 309-64) which was dismissed as frivilous by this Court (Appeal No. 18,645), he alleged as one ground for relief that he received ineffective assistance of counsel. In appellant's second petition in the form of a Motion pursuant to §2255 (although titled a Petition for Writ of Habeas Corpus- H.C. No. 405-65) , he did not explicitly allege ineffective assis-tance of counsel as ground for relief. However, appellant asserts now the right to renew and expand this issue that was originally made in Civil No. 309-65. Further, appellant urges that al-though this is, in effect, his second § 2255 motion, it is not successive in the legal sense since the earlier motion on the same grounds was decided without a hearing and did not result in a ruling on the merits. Sanders v. United States, 373 U.S. 1, 15-17 (1963).

A. The Appellant Received Ineffective Assistance Of Counsel During The Ten Days Following Sentence In The District Court.

Assuming this Court adopts the position of the District Court that appellant did receive "legal representation" during the ten days following the sentencing procedure, appellant urges the Court to also conclude that such representation was ineffective. Appellant's trial counsel has affirmed that he failed to discuss the possibility of appeal with the appellant and that he never advised the appellant concerning his right to appeal. These facts were apparently conceded by the Government at oral argument below, and were the finding of the District Court (Memorandum Decision at 1).

Appellant contends that such a finding of fact is sufficient to support the conclusion that the appellant was denied his constitutional rights under the sixth amendment. In Commonwealth v. Myers (Pa.), 202 Pa. Super. 292, 196 A.2d 209 (1963), the Court held that court-appointed counsel at trial has the duty to seek the highest appellate review available consistent with any trial errors that might have been made. If this is true, surely there exists a higher duty on the part of court-appointed counsel to at least inform the indigent defendant of his right to appeal, and the method to perfect it. Dodd v. United States, 321 F.2d 240 (C.A. 9th 1963). See also, Lloyd v. Warden, Maryland Penitentiary, 229 F. Supp. 364 (D.C. Md. 1964), where Chief Judge Thomsen,

in a case involving a state prisoner's petition for Writ of Habeas Corpus, stated that the failure to so inform a defendant may be a denial of procedural due process.

This Court has recently had occasion to speak on this subject. In Dillane v. United States, . U.S. App. D.C. , F.2d (No. 19,023, dec. June 17, 1965(), the Court, in dictum, stated:

> In the record before us there appear to be allegations that appellant's counsel, retained for his defense at the trial, never apprised him of his right to file a notice of appeal, or of the time within which that right might be exercised. If true, and if unexplained, this impresses us as such an extraordinary inattention to a client's interests as to amount to ineffective assistance of counsel cognizable under Section 2255. A motion under that statute containing such allegations, and otherwise entertainable by the court, would entitle the appellant to a hearing. If the court should find the facts to be alleged, it should, by the expedient of vacating and resentencing, restore appellant to the status of one on whom sentence has just been imposed and who has 10 days in which to institute a direct appeal. (slip opinion at 2-3).

Appellant contends that there has already been a finding by the District Court that he was not advised of his appellate rights by his court-appointed trial counsel. Therefore, the remedy of vacating and resentencing proposed by this Court in Dillane, supra, should be applied upon remand to the District Court. 1/

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1/ There is no need for appellant to presently demonstrate whether there exist grounds for a direct appeal. It is only after appellant has been restored to the status of one on whom sentence has just been imposed that such an issue arises. Dillane, supra (slip opinion at 3).

## CONCLUSION

Wherefore, appellant respectfully prays that the judgments below be reversed and the case remanded for the appropriate remedy.

Respectfully submitted,

Joseph D. Harbaugh

JOSEPH D. HARBAUGH
424 Fifth Street, N.W.
Washington, D.C.

Counsel for Appellant
(Appointed by this Court)

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been personally served at the office of the United States Attorney, United States District Courthouse, Washington, D.C. this 30th day of July, 1965.

Joseph D. Harbaugh
Joseph D. Harbaugh

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,081
19,252

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LYNN ROBERT CARLISLE, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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DAVID C. ACHESON,
*United States Attorney.*

FRANK Q. NEBEKER,
ALLAN M. PALMER,
*Assistant United States Attorneys.*

(H.C. No. 405-64)
(Cr. No. 780-63)

## QUESTIONS PRESENTED

1. Was appellant's motion for leave to file a notice of appeal approximately fourteen months out of time properly denied for want of jurisdiction, where appellant alleged that at the time of sentencing neither the Court nor his court-appointed counsel informed him of the right to appeal?

2. Where appellant has abandoned, in this Court, all of his claims raised in a collateral proceeding now under review and seeks in his brief to incorporate by reference an ineffective assistance of counsel claim urged in a prior, unrelated, collateral proceeding, which claim was never passed upon by the judge below, does proper judicial administration preclude "review" of this newly emergent claim and require, instead, affirmance of the judgment which, in reality, is not being contested?

# INDEX



## TABLE OF CASES

## RULE INVOLVED

Rule 37(a)(2), Federal Rules of Criminal Procedure, provides:

> *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

## SUMMARY OF ARGUMENT and ARGUMENT

### I.

Appellant's motion for leave to file a notice of appeal approximately fourteen months out of time was properly denied for want of jurisdiction by Judge McLaughlin.[1] *United States* v. *Robinson*, 361 U.S. 220 (1960); *Berman* v. *United States*, 378 U.S. 530 (1964); *Dillane* v. *United States*, —— U.S. App. D.C. ——, No. 19023, June 17, 1965.

> "If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may irrevocably be lost." *Coppedge* v. *United States*, 369 U.S. 438 (1962) (n. 5 at 443.)

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[1] Appellant's "STATEMENT OF THE CASE" is accurate, and we do not "deem it necessary" to expand upon it. D.C. Cir. R. 17(c)(3).

## II.

In his second argument, appellant seeks to incorporate by reference an ineffective assistance of counsel claim urged in a prior collateral proceeding, totally unrelated to this appeal, which claim was never passed upon by Judge Tamm.[2] Proper judicial administration, of course, precludes "review" in these circumstances and requires affirmance of the judgment which, in reality, is not being contested.

Moreover, it is apparent that it is not review that appellant seeks, but rather, what is essentially a trial court judgment that appellant "received ineffective assistance of counsel during the ten days following sentencing and that said sentence was thus 'imposed in violation of the Constitution . . . of the United States'." (Br. 27.) Upon that foundation appellant urges a remand of the case for "the remedy of vacating and resentencing proposed by this Court in *Dillane*, *supra*. . ." (Br. 29.) Even if this Court had the power to so rule, it would not be appropriate to do so on a record barren of *testimony* elucidating the precise reasons why no appeal was noted within ten days after judgment. This Court has previously indicated its preference for open court hearings in cases similar to the one at bar. See, *e.g.*, *Carrell* v. *United States*, 118 U.S. App. D.C. 264, 335 F.2d 686 (1964). The proper course, suggested by *Dillane*, would be for appellant to file a new motion under 28 U.S.C. § 2255 seeking the vacation and re-entry of his sentence upon appropriate allegations.[3]

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[2] Appellant has abandoned in this Court *all* of the claims *actually* raised in the collateral proceeding now under review. (No. 19081.)

[3] Although "appellant contends that there has already been a finding by the District Court that he was not advised of his appellate rights by his court-appointed trial counsel" (Br. 29), a careful reading of Judge McLaughlin's memorandum opinion reveals that the court was merely following the practice of assuming the truth of appellant's allegations for purposes of the motion. *Cf. Bailey* v. *United States*, 101 U.S. App. D.C. 11, 246 F. 2d 698 (1957). Thus, at page five of his opinion we find:

> "Defendant also attempts to distinguish Robinson from the instant case by pointing out that in Robinson the defendant

## CONCLUSION

Wherefore, it is prayed that the judgments appealed from should be affirmed.

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ALLAN M. PALMER,
*Assistant United States Attorneys.*

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knew he had the right to appeal, whereas Defendant here alleges that he had no such knowledge. Assuming arguendo that the defendant lacked all knowledge of his right to appeal and particularly the notice requirement of Rule 37(a)(2), such a fact cannot in the Court's judgment constitute an exception to Robinson."

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